IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1084

J. BERNARD GATES, Chairman
Connecticut Board of Parole, et al

Petitioners

v.

ARTHUR ANTHONY DeLORENZO

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioners, who consist of the membership of the Connecticut Board of Parole, respectfully pray that a Writ of Certiorari issue to review only that portion of the judgment and opinion of the United States Court of Appeals for the Second Circuit which remanded the case to the District Court for the District of Connecticut for a trial to establish a record of what burden would be involved and usefulness would result from allowing prisoners to have access to their files prior to a parole release hearing.

Said judgment and opinion were entered on October 20, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at pp. 1a-9a.

The opinion of the District Court for the District of Connecticut is reported in 406 F. Supp. 1227.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were rendered on October 20, 1976.

The petitioners timely filed a Petition for Re-Hearing Pursuant to Rule 40, Federal Rules of Appellate Procedure, With Suggestion For Hearing In Banc. (See Appendix pp. 10a-13a).

This petition was denied by the United States Court of Appeals for the Second Circuit by Order dated December 9, 1976. (See Appendix pp. 14a-15a).

This petition for a Writ of Certiorari was filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States entitle prospective parolees to be permitted to inspect the Parole Board's file prior to a parole release hearing?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Three inmates of the Connecticut Correctional Institution, Somers, after having been denied release on parole by the Connecticut Board of Parole, instituted separate actions in the District Court for the District of Connecticut. These inmates were Thomas LaBonte, Michael Holup and Howard Studley.

Counsel on both sides were identical and for all relevant purposes the same claims were made in each action. The only difference being that Holup claimed he was denied release on parole because of bias on the part of the parole panel which denied him parole and claimed money damages in addition to declaratory and injunctive relief. This claim was dismissed in the District Court for the reason that ". . . absolutely no evidence was presented to support this allegation . . .". See: *LaBonte* v. *Gates*, 406 F. Supp. 1227, 1228, footnote 1, (D. Conn. 1976).

By agreement of the parties and with the approval of the District Court, the three actions were consolidated and tried together.

Of the various issues raised in their complaints, only two were claimed in the District Court and in the Court of Appeals. These claims were that the Due Process Clause of the Fourteenth Amendment requires (a) that each state prisoner be allowed to inspect his prison file before it is used by the Board of Parole in deciding whether or not to release the inmate on parole, and (b) that each inmate be permitted the assistance of counsel or counsel substitute during his parole release hearing.

Jurisdiction was claimed under 42 U.S.C. Sections 1983 and 28 U.S.C. Sections 1343 (3) and 1343 (4), as well as

under the Declaratory Judgment Act, 28 U.S.C. Sections 2201 and 2202.

In order to obviate the need for a three-judge court, prayers for injunctive relief, which were made in each complaint, were dropped. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-55, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963). This left only a prayer for a declaratory judgment and, in Holup's action, a demand for money damages.

Following the trial and while the matter was sub judice, Studley and LaBonte were released on parole. Their cases were dismissed as moot on the authority of *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S. Ct. 347, 46 L.Ed.2d 350 (1975). This dismissal was affirmed by the Second Circuit (See Appendix p. 2a).

The controversy between Holup and the Board remained alive. Following the trial, Holup moved, in the District Court, for a certification as a class in order to avoid future mootness problems. The motion was denied ". . . because the motion was not filed until after the hearing on the merits and after the decision had been rendered . . ." *LaBonte* v. *Gates*, supra P. 1229.

The District Court then rendered its opinion rejecting the above stated claims and entered judgment dismissing Holup's action on the merits.

Holup then appealed to the United States Court of Appeals for the Second Circuit.

At the time of the decision of the District Court, two other inmates confined in the Connecticut Correctional Institution, Somers, had cases pending in the District Court raising the same issues as were dismissed in *LaBonte*, *Studley* and

Holup's actions. These inmates were Craig Copley and Arthur A. DeLorenzo.

These latter actions were dismissed by the District Court, sua sponte for failure to state a claim upon which relief can be granted.

These dismissals were based upon the authority of *Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975); *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), Cert. denied 400 U.S. 1023 (1971) and the decision of the District Court in *LaBonte*, supra.

The decision of the District Court as well as the judgment in *DeLorenzo* v. *Gates, et al*, Civ. No. H75-416 (D. Conn. 1976), are contained in the Appendix at pp. 16a-18a.

Both Copley and DeLorenzo then appealed to the Second Circuit.

Counsel in *Holup, Copley and DeLorenzo* were identical. By agreement of the parties and with the approval of the District Court, the trial record in *LaBonte*, *Studley* and *Holup* was ordered to be made the record in the Court of Appeals on the appeals of *Holup*, *Copley* and *DeLorenzo*.

Again by stipulation of the parties and by order of the Second Circuit, the three appeals were ordered to be argued at the same time.

Lastly, Holup was released on parole on March 22, 1976 and Copley was discharged from custody on April 23, 1976. Their appeals then became moot. See *Weinstein* v. *Bradford*, supra.

Therefore, the only appeal actually covered by the opinion of the Second Circuit was that of Arthur A. DeLorenzo. (See Appendix p. 3a).

The Second Circuit affirmed that portion of the judgment of the District Court which dismissed the claim that due process entitles a prospective parolee to be represented by counsel or counsel substitute at a parole release hearing. (It is only parole *release* hearings and not parole *revocation* hearings which were involved in this case).

On the issue of access by the prisoner to his file, the Second Circuit stated the issue to be ". . . whether due process requires us to assume that only by exposing every prison file in advance can misinformation or failure to consider information favorable to the prisoner in the parole release process be substantially avoided." (See Appendix p. 8a).

Although noting that DeLorenzo, who as observed above, was the only prisoner with standing at the time the case was decided, agreed to have his appeal determined upon the trial record in *Holup, Studley* and *LaBonte* and after further noting, in effect, that a review of that trial record showed that access by the prisoner to his file would not have contributed to the fairness of the hearing or the accuracy of the Board's judgment in denying parole (See Appendix p. 7a) the Second Circuit held that it did not have sufficient evidence in the record to determine how the question posed above should be determined.

The portion of the judgment of the District Court which held that due process did not entitle a prisoner to access to his file prior to his parole release hearing was remanded to the District Court ". . . to hold a separate trial in DeLorenzo's case in which an adequate record will be made . . ." (See Appendix p. 9a).

This record was to cover: (1) whether access to their files would be of any help in the average case in view of the unchallenged facts that 95% of Correctional inmates

eligible for parole are released on parole before their sentence expires and that over 50% are not released at their first parole release hearing; (2) whether mistakes, if any, in the Board's files deal with matters material to the parole process; (3) ". . . whether the burden that would be imposed upon the Parole Board if appropriate review for the redaction of confidential material were made, would be onerous, and whether giving a redacted file to every prospective parolee, including those who will be granted parole, would make for an excessive, and, indeed, unnecessary burden"; (4) the history of the mistakes, if any, actually called to the attention of the Connecticut Board of Parole; and (5) ". . . the method that would be used in redacting prisoners' files and the extent of such burden, if it were required that only prisoners who have been denied parole should be given access to their redacted files with a further prompt second hearing after the prisoner has had a chance to look through his file for mistaken items". (See Appendix pp. 8a-9a).

It is from this portion of the judgment of the Second Circuit which the petitioners seek review in this Court.

The judgment of the Second Circuit did not clarify whether in the trial ordered in DeLorenzo a record must be made:

a) which includes files of persons denied parole other than Arthur Anthony DeLorenzo;

b) if the record must include such files, then approximately how many files should be considered;

c) if other files must be reviewed, then how can this be done without prejudicing the possible rights of prisoners who are not parties to this action; and

d) must the record include whether or not material mistakes have been made in denying parole to other prisoners who are not parties to this action.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION OF TO WHAT EXTENT, IF ANY, DUE PROCESS APPLIES TO PAROLE RELEASE HEARINGS IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Rule 19 1 (b) of this Court provides, in part, that one of the factors to be considered in granting Certiorari is whether ". . . a Court of Appeals has . . . decided an important question of Federal Law which has not been, but should be, settled by this Court . . ."

In *Scott* v. *Kentucky Board of Parole*, 423 U.S. 1301, 96 S. Ct. 561 (1975) this Court granted a petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review an order from that Court holding that the requirements of due process are not applicable to parole release hearings.

It thereafter appearing that the petitioner, Scott, had been granted parole by the Kentucky Board of Parole, the judgment of the Sixth Circuit was vacated and the case remanded for consideration of the question of mootness. *Scott* v. *Kentucky Board of Parole*, 97 S. Ct. 342 (1976).

This latter order was dissented to by Mr. Justices Stevens, Brennan and Powell.

Not including *Scott* the dissent cites at least three additional cases, all involving the issue of to what extent, if any, due process applies to parole release hearings, which worked their way to this Court only to run into a mootness problem

because the prisoner involved had been paroled or discharged. *Scott* v. *Kentucky Parole Board*, 97 S. Ct. 342, 343, note 1.

These cases are *Bradford* v. *Weinstein*, 519 F.2d 728 (C.A. 4, 1974), vacated as moot 423 U.S. 147, 96 S. Ct. 347, 46 L.Ed.2d 350 (1975); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (C.A. 2), vacated as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015, 95 S. Ct. 488, 42 L.Ed.2d 289 (1974), and *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (C.A. 5 en banc), vacated and remanded to consider mootness, 414 U.S. 809, 94 S. Ct. 79, 38 L.Ed.2d 44 (1973).

The above cases which seemed headed for resolution by this Court held (1) due process applies (*Bradford* v. *Weinstein*, supra), (2) due process applies to the extent that reasons for denial of parole must be given (*United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, supra), and (3) that due process does not apply (*Scarpa* v. *United States Board of Parole*, supra). See *Scott* v. *Kentucky Board of Parole*, 97 S. Ct. 342, 343, note 1 (1976).

Certainly, in view of the volume of litigation in the Circuit and District Courts and the variety and conflict in opinion, this due process issue should be "settled" by this Court and by granting Certiorari in *Bradford* v. *Weinstein*, supra, and *Scott* v. *Kentucky Board of Parole*, supra, it is obvious that this Court has taken this position.

In this regard, the petitioners represent to this Court that Arthur A. DeLorenzo was last denied release on parole on September 21, 1976. He is scheduled for a future parole release hearing in September, 1977 (See letter dated October 14, 1976 to the Panel of the United States Court of Appeals for the Second Circuit which rendered the opinion and judgment from which this review is sought).

In short, this Court has clearly recognized that the issue of to what extent, if any, due process applies to a parole release hearing, is one which should be "settled" by this Court and the review sought herein is clearly within both the letter and spirit of Rule 19 1 (b) of this Court.

Further, the conflict among the decisions of the various Circuits, as noted above, with regard to the issue of to what extent, if any, due process principles are applicable to parole release hearings, more than justifies the granting of the instant petition under that portion of Rule 19 1 (b) which provides that another factor to be considered in determining whether to grant review on a Writ of Certiorari is whether ". . . a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . .".

Although the Second Circuit in this case did not hold that due process requires access by the prisoner to the Parole Board's file but rather remanded to the District Court to make a record on this issue as noted above and did not ". . . intimate what the District Court should decide after the full record is made before it." (See Appendix p. 9a) the Second Circuit of necessity held that due process is applicable to parole release hearings. Otherwise, it would have affirmed the judgment of the District Court in its entirety.

Further, in refusing to affirm the District Court's judgment in its entirety, the Court acted contrary to its previous opinion in *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 945 (2d Cir. 1976) where another panel of the Second Circuit held "The petitioner, therefore, has no such constitutional right to the information in the parole board's file, including but not limited to the pre-sentence report and the examiner panels report. It was error for the district court to hold to the contrary." (Footnote 8. omitted).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents an important question of federal law which should be settled by this Court, which question has been decided in differing and conflicting manners by the various Circuit Courts of Appeals which have considered it.

The Petitioners respectfully request that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit.

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Counsel for Petitioners

CERTIFICATION

This is to certify that on this 21st day of January, 1977, two copies of this Petition for Writ of Certiorari and Appendix thereto were mailed, postage prepaid, to Stephen Wisner and Phil Kunsberg, New Haven, Connecticut (Judith M. Mears, Dennis E. Curtis and Mary F. Keller, of counsel, for the Respondent.

STEPHEN J. O'NEILL
Assistant Attorney General

IN THE

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1078, 1296, 1297 — September Term, 1975.

(Argued June 17, 1976 Decided October 20, 1976.)

Docket Nos. 76-2013, 76-2018, 76-2045

MICHAEL HOLUP, CRAIG COPLEY,
ARTHUR ANTHONY DELORENZO,
Plaintiffs-Appellants,

—against—

J. BERNARD GATES, Chairman,
Connecticut Board of Parole, et al.,
Defendants-Appellees.

Before:

MANSFIELD, OAKES and GURFEIN,
Circuit Judges.

Action for declaratory judgment that the Due Process clause of the Fourteenth Amendment requires the Connecticut Board of Parole (1) to allow each prisoner the assistance of counsel or a counsel-substitute during the parole release hearing and (2) to allow each prisoner to inspect his prison file before it is used in deciding whether to grant parole. From a dismissal by the District Court for the District of Connecticut (Blumenfeld, *J.*), a single prisoner appeals. Held: that counsel or a substitute need not be permitted to attend the parole hearing. The case is remanded to the District Court to determine more fully the extent of the burden that would be imposed upon the Connecticut Parole Board if redacted files had to be made available to prisoners in various circumstances, as well as other matters adverted to in this opinion.

The judgment denying the right to representation at the parole board hearing is affirmed.

STEPHEN WISNER and PHIL KUNSBERG,* New Haven, Conn. (Judith M. Mears, Dennis E. Curtis and Mary F. Keller, of counsel), *for Plaintiffs-Appellants.*

STEPHEN J. O'NEILL, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General, Hartford, Conn., of counsel), *for Defendants-Appellees.*

GURFEIN, *Circuit Judge:*

There were originally three plaintiffs in the District Court of Connecticut, Thomas LaBonte, Michael Holup and Howard Studley. Each separately sought a declaratory judgment under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 to the effect that the Due Process Clause of the Fourteenth Amendment requires (a) that each state prisoner be allowed to inspect his prison file *before* it is used by the Connecticut Parole Board in deciding whether to grant the inmate parole, and (b) that each inmate be allowed the assistance of counsel or a counsel-substitute during the parole release hearing.

These three plaintiffs were given a joint trial by the District Judge, Hon. M. Joseph Blumenfeld. Following the trial, but before the decision of the District Court was announced, Studley and LaBonte were released on parole. Their actions were properly dismissed as moot. *See Weinstein* v. *Bradford*, —— U.S. ——, 96 S. Ct. 347 (1975). Holup moved to certify a class of plaintiffs with himself as its representative. The court denied certification essentially

* Appeared pursuant to the Student Practice Rule (46E) of this Court.

because the application was made after the trial had already been held. No attempt has been made to appeal this ruling.

Judge Blumenfeld proceeded to render a decision in the case of Holup. He rejected both claims in a considered opinion, *LaBonte* v. *Gates*, 406 F. Supp. 1227 (D. Conn. 1976). After the decision Holup, too, was released on parole, and no appellant of the original three plaintiffs remained. At the time of the decision, however, two similar actions had been pending, brought by inmates Craig Copley and Arthur DeLorenzo.

Without a further hearing, the Judge dismissed their complaints on the authority of his decision in *LaBonte* v. *Gates, supra.* While three appeals were still pending by Holup as well as Copley and DeLorenzo, Copley was also paroled. That leaves one appellant, DeLorenzo, still incarcerated. His appeal remains the only appeal before us.

I.

Judge Blumenfeld was correct in holding that due process does not require Connecticut to change its present rules regarding the participation by counsel in the parole release hearing. The Connecticut procedure in this regard is eminently fair. Counsel for the parolee is permitted to have a pre-hearing conference with the chairman of the panel which will decide the parolee's case, and to place in the file which all members of that panel read, any statement or other documentary information. The justification advanced by the Board for excluding counsel or counsel-substitute from the hearing itself is quite reasonable: The purpose of the hearing in the Connecticut system is to enable the members personally to speak with and observe the inmate, to determine his attitude towards his crime, readiness for parole and the like. The members feel that this can best be achieved by hearing the inmate's own words, unguided by the presence or promptings

of counsel. We find that the state's interest in excluding persons other than the inmate from the hearings outweighs the "need for and usefulness" to the inmate of having such a representative, despite the inmate's concededly great interest in the decision being made. *See Haymes* v. *Regan, supra*, 525 F.2d at 543; *Frost* v. *Weinberger, supra*, 515 F.2d at 66.

The Supreme Court has declined to hold appointment of counsel constitutionally required in all parole or probation *revocation* cases, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973). On the basis of *Gagnon*, the Seventh Circuit held that "[s]ince the arguments favoring the appointment of counsel certainly have no greater force as applied to a parole release hearing than to a parole revocation hearing, this holding requires rejection of plaintiff's due process arguments" for the right to counsel in a parole release hearing. *Ganz* v. *Benzinger*, 480 F.2d 88, 90 (7th Cir. 1973) (Stevens, *J.*). And the Court has also recently refused "to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings", *Wolff* v. *McDonnell*, 418 U.S. 539, 570 (1974), even though these proceedings, which involve the loss of "good time," to some extent resemble traditional adversary proceedings which have been thought to require counsel for the accused. *See also, Baxter* v. *Palmigiano*, 44 U.S.L.W. 4487 (U.S. April 10, 1976).

Although the parole release decision is arguably distinguishable from the types of proceedings involved in the above decisions, we do not think this helps appellants and in any case the direction of the Court is clear.[1] In view of

[1]We note the distinctions made in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). There the court stated:

> "There is a substantial difference on the due process issue between a finding of serious disciplinary action leading to loss of good-time credits, involved in *Wolff*, and denial of an application for parole. The broad discretion of the Board in the latter instance lessens the content of required due process . . . ." *Id.* at 1282.

the generous opportunity afforded counsel to place his or her views on the record prior to the hearing, we hold that the Constitution does not require the Connecticut State Board of Parole to permit counsel or counsel-substitute to attend the hearings.

II.

This appeal comes to us in an unusual posture. The original plaintiffs who had a hearing are no longer engaged in a case or controversy that is justiciable. *See DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). *Cf. Frost* v. *Weinberger*, 515 F.2d 57, 62-63 (2d Cir. 1975). The only remaining appellant, DeLorenzo, had no hearing. We have no record to review in appellant's own case, but he is willing to stand on the trial record made in the other cases, in which Connecticut Parole officials testified. The claim is that as a matter of constitutional law, *any* parole procedure which fails to allow *every* prospective parolee an inspection of his file in advance of his hearing, whether requested or not, is a violation of the Fourteenth Amendment by the State involved.[2] The procedure by which this abstract proposition is presented is by a request for a declaratory judgment.[3]

And Judge Tamm in a concurring opinion stated:

> ". . . I recognize a distinction between the discretion afforded the government in denying an application of conditional liberty and in revoking liberty once granted. Consequently, I do not read our holding as requiring that parole denial procedures incorporate all the elements of due process made applicable to parole revocation proceedings in *Morissey*." *Id.* at 1286.

See Ganz v. *Bensinger*, 480 F.2d 88, 90 (7th Cir. 1973).

[2]The district courts are divided on the question of access to files in parole release decision-making. *Compare Childs* v. *United States Board of Parole*, 371 F. Supp. 1246 (D.D.C. 1973), *aff'd in part, vacated in part*, 511 F.2d 1270 (D.C. Cir. 1974); *Franklin* v. *Shields*, 339 F. Supp. 309, 316-17 (W.D. Va. 1975); *Cooley* v. *Sigler*, 381 F. Supp. 441, 443 (D. Minn. 1974) with *Fisher* v. *United States*, 382 F. Supp. 241 (D. Conn. 1974); *Wiley* v. *United States Board of Parole*, 380 F. Supp. 1194 (M.D. Pa. 1974).

[3]We think that in the absence of a record that tells us what happened in DeLorenzo's case we should be reluctant to declare rights generally. The granting of declaratory relief is governed by equit-

In *Haymes* v. *Regan*, 525 F.2d 540, 543 (2d Cir. 1975), we specifically considered a three-pronged test to be applied in deciding what procedural protections are constitutionally due in the particular state proceeding, the balance between "the inmate's interest in the proceedings . . . 'the need for and usefulness of the particular safeguard in the given circumstances' . . . [and] any direct burden which might be imposed on the Board by this requirement," citing *Frost* v. *Weinberger*, 515 F.2d 57, 66 (2d Cir. 1975) and *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960). We followed the balancing test earlier laid down in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928-29 (2d Cir. 1974). *See Bradford* v. *Weinstein*, 519 F.2d 728, 733 (4th Cir. 1974), *vacated as moot*, —— U.S. ——, 96 S. Ct. 347 (1975).

We decided in *Haymes* that the New York statute (Correction Law § 214) requiring the Board to inform each prisoner denied parole of "the facts and reason or reasons for such denial" was sufficient. We held that "[t]his requirement, if properly observed, should serve to protect the inmate from arbitrary and capricious decisions or actions grounded upon impermissible considerations. *United States ex rel. Johnson, supra*, 500 F.2d at 929." 525 F.2d at 544.

We could accept this as dispositive of the issue here raised, particularly when we must also balance the possible administrative hardship in redacting each file to excise information given in confidence or which threatens prison discipline.

On the other hand, if we were convinced that errors in the files of Connecticut are especially common and that the

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able principles, *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948), and within the sound discretion of the reviewing court. *See Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 462 (1945). *See also Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 245 (1953).

true facts upon which parole is denied are often concealed, we might reach another conclusion.

The trial of the three original plaintiffs, on which appellant relies, discloses that the Connecticut Parole Board apparently follows the requirements of *Haymes* v. *Regan*, 525 F.2d 540 (2nd Cir. 1975), and *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir. 1974). The Board gives its reasons for denying parole with respect to each inmate on an individual basis, and also reveals the adverse information on which it relies. In none of the cases heard by Judge Blumenfeld did the plaintiff appear to have been taken by surprise. In each case, the inmate had been informed at the parole hearing of the information in his file about which the Board was concerned. In each case the inmate was allowed to comment on and to explain such undisputed facts as a lengthy criminal record, a recent escape attempt, and a denial of guilt to a psychiatrist before pleading guilty in court. Inmates were permitted to rebut the articulated reasons stated by the Board which militated against parole. Judge Blumenfeld repeatedly sought to elicit from the plaintiffs specific instances of inaccuracies in the files or of other prejudice to the plaintiffs because of the absence of disclosure in advance of the hearing. None was established. There is nothing in *Haymes* v. *Regan* itself to require that that Parole Board do more than "provide the inmate with both the grounds for decision to deny him parole, and the essential facts from which the Board's inferences have been drawn." 525 F.2d at 544. This Connecticut does.

The Supreme Court has never passed on the question, however, whether a presentence report must be shown to a

defendant in advance of sentencing.[4] The Court has held that a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are "materially untrue." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), or if it is founded "in part upon misinformation of constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 447 (1972). With this resolution of the ultimate effect of material mistake, we must, of course, agree. And, as we explained in *United States ex rel. Johnson, supra*, 500 F.2d at 930, in the case of a parole board, judicial review should be available "when its decision has no basis in the prisoner's file." *See also Kohlman* v. *Norton*, 380 F. Supp. 1073, 1074-75 (D. Conn. 1975). The question is whether due process requires us to assume that only by exposing every prison file in advance can misinformation or failure to consider information favorable to the prisoner in the parole release process be substantially avoided.

In subjecting the due-process claim to a balancing test, we do not have sufficient hard evidence in this record upon which to base a judgment. There is no doubt that many inmates would like as much preparatory material as possible in advance of their appearance before the Board. Whether the divulging of information in the file will, in the average case, be of any help in allowing the inmate to affect the parole decision is more doubtful. The Connecticut Parole Board releases over 95% of the inmates on parole before term expiration, and over 50% at the first parole hearing.[5] Nor are we clear on this record whether the "mistakes" in the parole files are of matters material to the parole decision. We lack convincing evidence, moreover, of whether the burden that

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[4]The Supreme Court has granted certiorari to consider the legality of a death sentence where the judge refused to disclose a confidential section of the presentence report on which he relied in part in imposing a death sentence contrary to the recommendation of the jury. *Gardner* v. *Florida*, No. 74-6593, 44 U.S.L.W. 3761 (June 6, 1976).

[5]*See LaBonte* v. *Gates*, 406 F. Supp. 1227, 1231 n.6 (D. Conn. 1976).

would be imposed upon the Parole Board if appropriate review for the redaction of confidential material were made, would be onerous, and whether giving a redacted file to every prospective parolee, including those who will be granted parole, would make for an excessive, and, indeed, unnecessary burden.

We must accordingly remand to the District Court, with some reluctance, to hold a separate trial in DeLorenzo's case in which an adequate record will be made to supply the evidence mentioned above. The history of the mistakes actually called to the attention of the Connecticut Parole Board should also be elicited. Testimony should also be taken on the method that would be used in redacting prisoners' files, and the extent of such burden, if it were required that only prisoners who have been denied parole should be given access to their redacted files with a further prompt second hearing after the prisoner has had a chance to look through his file for mistaken items.

We do not intimate what the District Court should decide after the full record is made before it. Since we have already devoted so much time to this appeal, however, we believe it to be in the interest of an orderly administration that this panel retain jurisdiction in the event that there is a further appeal.

Remanded for further proceedings relating to Part II of this opinion. The District Court's judgment denying the right to representation at a parole board hearing is affirmed.

IN THE

UNITED STATES COURT OF APPEALS

DOCKET NOS. 76-2013, 76-2018, 76-2045

MICHAEL HOLUP, CRAIG COPLEY,
ARTHUR ANTHONY DELORENZO
Plaintiffs-Appellants,

v.

J. BERNARD GATES, CHAIRMAN,
CONNECTICUT BOARD OF PAROLE, ET AL,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Connecticut

PETITION FOR RE-HEARING PURSUANT TO RULE 40, FEDERAL RULES OF APPELLATE PROCEDURE, WITH SUGGESTION FOR HEARING IN BANC

CARL R. AJELLO
Attorney General
STEPHEN J. O'NEILL
Assistant Attorney General
340 Capitol Avenue
Hartford, Connecticut 06115

The Appellees respectfully represent that:

1. On October 20, 1976, a panel of this court rendered its decision in the instant appeal.

2. The decision of the court was not received by the Appellees until October 29, 1976.

3. In part, the decision of this court reversed the decision of the district court (See: *Labonte* v. *Gates,* 406 F. Supp. 1227 (D. Conn. 1976)), on the issue of whether or not the Connecticut Board of Parole is required under due process principles to allow a prisoner to inspect his prison file prior to a parole release hearing.

4. The decision of this court remanded the case to the district court on the issue for an evidentiary hearing to determine whether or not:

a. Connecticut parole release hearings are based upon material mistakes;

b. what burden would be imposed upon the Parole Board if review of the prisoners files were allowed;

c. the history of mistakes actually called to the attention of the Parole Board in its parole release decisions;

d. the method that would be used in reviewing prisoners files for the exclusion of confidential materials and the burden involved therein; and

e. the burden involved in such review if access were limited to those inmates who had been denied parole.

5. In refusing to affirm the decision of the district court that due process does not require that the Board of Parole give access to the prisoner to his file prior to his parole release hearing the court held, contrary to a previous decision of this court, in *Billiteri* v. *United States Board of Parole, et al*, Docket No. 75-6120, decided August 30, 1976.

6. In *Billiteri* at page 5296 of the slip opinion another panel of this court held, relying on *Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975), that:

> "The petitioner, therefore, has no such constitutional right to the information in the Parole Board's file, including but not limited to the pre-sentence report and the examiner panel's report.[8] Under the new act, see note 1 supra, however, a prisoner now has the statutory right under Section 4208(b) to this type of information, subject to the limitations stated therein."

7. Pursuant to the provisions of Rule 35(a), Federal Rules of Appellate Procedure, a hearing in banc is appropriate "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions."

8. Pursuant to Rule 40(a), a petition for re-hearing is appropriate when the court ". . . has overlooked . . ." a point of law.

9. The Appellees respectfully claim that the conditions for both hearing in banc and re-hearing by this panel, as set forth above, have been satisfied.

WHEREFORE, the Appellees respectfully request that this decision be reheard in accordance with this petition.

Appellees

CARL R. AJELLO
Attorney General

By: STEPHEN J. O'NEILL
Assistant Attorney General
340 Capitol Avenue
Hartford, Connecticut 06115

CERTIFICATION

This is to certify that two copies of the petition for re-hearing were mailed, postage pre-paid to Stephen Wisner and Phil Kunsberg, Judith M. Mears, Dennis E. Curtis and Mary F. Keller, of counsel, Yale Legal Clinic, 127 Wall Street, New Haven, Connecticut, this 3rd day of November, 1976.

STEPHEN J. O'NEILL
Assistant Attorney General

ORDER

The foregoing petition having been considered by the court, it is herewith GRANTED.

BY THE COURT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of December, one thousand nine hundred and seventy-six.

———————————x Docket No. 76-2013

MICHAEL HOLUP, et al.,
Petitioners-Appellants,

v.

J. BERNARD GATES, Chairman, Connecticut Board of Parole, et al.,
Respondents-Appellees.

———————————x

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN, *Chief Judge*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of December, one thousand nine hundred and seventy-six.

Present:
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
HON. MURRAY I. GURFEIN,
Circuit Judges.

MICHAEL HOLUP, CRAIG COPLEY, ARTHUR ANTHONY DELORENZO,
Plaintiffs-Appellants,

v.

J. BERNARD GATES, CHAIRMAN, CONNECTICUT BOARD OF PAROLE, et al,
Defendants-Appellees.

Docket No. 76-2013

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARTHUR ANTHONY DeLORENZO

v.

J. BERNARD GATES, Chairman
of the Connecticut Board of Parole, ET AL

CIVIL NO. H-75-416

MEMORANDUM OF DECISION

The plaintiff, an inmate at the Connecticut Correctional Institution at Somers, Connecticut, has filed this action challenging the constitutionality of the procedures of the Connecticut State Board of Parole. The complaint states that the plaintiff has been denied his right to due process by the defendants, acting under color of state law. 42 U.S.C. Section 1983. Jurisdiction exists pursuant to 28 U.S.C. Sections 1343(3) and 1343(4).

The issues raised in the complaint have, however, been determined against the plaintiff in *Haymes* v. *Regan*, No. 75-2096 (2d Cir. Oct. 29, 1975); *Menechino* v. *Oswald*, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), and my decision in *LaBonte* v. *Gates*, No. 75-119 (D. Conn. Jan. 13, 1976). The plaintiff's claim is too insubstantial to compel the convocation of a three-judge court even though the plaintiff requests an injunction against the Parole Board. *Cf. Andrews* v. *Maher*, No. 75-7029 (2d Cir. Oct. 24, 1975).

Therefore, the action is dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Fed. R. Civ. P.

SO ORDERED.

Dated at Hartford, Connecticut, this 15th day of January, 1976.

M. JOSEPH BLUMENFELD
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARTHUR ANTHONY DeLORENZO

v.

J. BERNARD GATES, Chairman
of the Connecticut Board of Parole, ET AL

CIVIL ACTION NO. H-75-416

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge;

And the Court having filed its Memorandum of Decision dismissing the Plaintiff's Complaint for Failure to state a claim upon which relief can be granted;

It is accordingly ORDERED and ADJUDGED that the Plaintiff's Complaint be and is hereby dismissed.

Dated at Hartford, Connecticut, this 28th day of January, 1976.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Deputy-in-Charge

STATE OF CONNECTICUT

OFFICE OF THE ATTORNEY GENERAL
340 Capitol Avenue
Hartford 06115

CARL R. AJELLO
Attorney General

October 14, 1976

Honorable Murray I. Gurfein
Circuit Judge
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

RE: Michael Holup, Craig Copley and Arthur Anthony DeLorenzo v. J. Bernard Gates, Chairman, Connecticut Board of Parole, et al
Civil Action Nos. 76-2013, 76-2018 and 76-2045

Dear Judge Gurfein:

At the request of Mr. Hugh Hansen, I have inquired of the Connecticut Board of Parole with regard to the parole status of Mr. Arthur Anthony DeLorenzo.

Mr. DeLorenzo was denied parole at a hearing held on September 21, 1976. He has been scheduled for a future parole release hearing in September, 1977.

Very truly yours,

CARL R. AJELLO
Attorney General
STEPHEN J. O'NEILL
Assistant Attorney General

SJO'N/pcv

CC: Honorable Walter R. Mansfield
Honorable James L. Oakes
Steven Wizner, Esq.